IN THE DISTRICT COURT WITHIN AND FOR

THE COUNTY OF PITKIN AND STATE OF COLORADO

Criminal Action No. C-1616

THE PEOPLE OF THE STATE OF COLORADO,	)	
Plaintiff,	)	
vs.	)	PEOPLE'S BRIEF REGARDING IDENTIFICATION ISSUE
THEODORE R. BUNDY,	)	
Defendant.	)	

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I. Identification of defendant by Carol DaRonch

The issues of compelled testimony and right to counsel at lineups and photo displays have been litigated before the U.S. supreme Court. In Gilbert v. California, 388 U.S. 263, 87 S.Ct. 1951(1967), the court said unequivocally that after the defendant is indicted, his right to counsel is triggered and any lineups conducted thereafter must be with notice to defense counsel. This same requirement is noted in U.S. v. Wade, 388 U.S. 218, 87 S.Ct. 1926(1967), decided the same day as Gilbert. Both cases hold that post indictment lineups are "critical" stages of a prosecution and, thus, the defendant must have counsel. If, in fact, a post indictment lineup is conducted without counsel, the identification must be suppressed unless the state can show, by clear and convincing evidence, an independent basis for identification, Wade, supra. The independent basis test is also applicable in cases where the pre-indictment lineup or photo display is "so impremissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification," Simmons v. U.S., 390 U.S., 88 S.Ct. 967(1967). Independent basis factors to consider are:

(1) prior opportunity for victim to observe defendant;
(2) discrepency between defendant's actual description and the description given police at the time of the crime;
(3) misidentification of another as perpetrator of the crime;
(4) prior identification through photo lineup;
(5) failure to identify defendant on prior occasion;
(6) lapse of time between crime and lineup or photo display; and
(7) method used at lineup;

In the Bundy case, all identifications were made before an indictment or information was filed. The case had not reached a critical stage of prosecution requiring counsel. Futhermore, defendant was given counsel at the physical lineup of October 2, 1975. The lineup was

conducted pursuant to a court order and under the appropriate procedures required by Utah statute. See attached exhibits "A"(Statute), "B"(sworn testimony) and "C"(Order of Court). This lineup occurred before any indictment or information was filed against Mr. Bundy. The procedure used conformed to criteria set forth in the Gilbert, Wade and Stovall v. Denno, 388 U.S. 293, 87 S.Ct. 1967(1967) decisions. Thus, there is no reason to suppress the lineup identification on Right to Counsel grounds.

There is no legitimate issue of Right to Counsel at the photo lineups. U.S. v. Ash, 413 U.S. 300, 93 S.Ct. 2568 (1968) specifically held (at p.2579) that ... "the Sixth Amendment does not grant the right to counsel at photographic displays conducted by the Government for the purpose of allowing a witness to attempt an identification of the offender". This is true whether the photo display is shown pre-or-post indictment. People v. Pew, 543 P.2d 86(1975).

No grounds exist to suppress the lineups on the basis of self incrimination. This theory was presented and rejected in the Wade case, supra.

The remaining grounds for suppression rely on the Due Process Clause of the 5th Amendment. That issue has been presented in Utah and a portion of the prosecution's brief is presented to the court as Exhibit "D". The brief contains analysis of the U.S. Supreme Court decisions and the controlling Utah case law.

In addition to the cases contained in Exhibit "D", the recent U.S. Supreme Court case of Manson v. Braithwaite, ____U.S.____, 97 S.Ct. 2243 (June 16, 1977), is significant. There the court reiterated the standards for photo identification contained in Simmons v. U.S., 390 U.S. 377, 88 S.Ct. 967(1968) wherein the court said:

"Despite the hazards of initial identification by photograph, this procedure has been used widely and effectively in criminal law enforcement, from the standpoint both of apprehending offenders and of sparing innocent suspects the ignominy of arrest by allowing eyewitnesses to exonerate them through scrutiny of photographs. The danger that use of the technique may result in convictions based on misidentification may be substantially lessened by a course of cross-examination at trial which exposes to the jury the method's potential for error. We are unwilling to prohibit its employment, either in the exercise of our supervisory power or, still less, as a matter of constitutional requirement. Instead, we hold that each case must be considered on its own facts, and that convictions based on eyewitness identification at trial following a pre-trial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification."

Turning then to the appropriate test for determining identification reliability, the Manson court adopted the "totality of the circumstances" test set forth in Stovall, supra. The court also adopted the criteria of "circumstances" set forth in Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375 (1972). The exact language Manson contains is:

"We therefore conclude that reliability is the linchpin in determining the admissibility of identification testimony for both pre- and post-Stovall confrontations. The factors to be considered are set out in Biggers, 409 U.S., at 199-200, 93 S.Ct., at 382. These include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation. Against these factors is to be weighed the corrupting effect of the suggestive identification itself".

IF SUGGESTIVE THEN.

Manson actually was a one photograph pre-trial identification. The case resolved a conflict which had evolved from the "per se" exclusion rule (an outgrowth of the Gilbert and Wade decisions) and the "totality" test set forth in Stovall. The second circuit had adopted the "per se" rule and excluded the one photo,

pre-trial identification as impermissibly suggestive. The Supreme Court reversed and held that the identification was admissible under the "totality of circumstances" test even if one photograph is suggestive. The constitutional test is "totality of circumstances." Both Utah and Colorado follow the principles espoused in the Manson decision.

People v. Keelin, Colo. App., 565 P.2d 957,(1977), cites Simmons as controlling law on photo displays and states at p.959, "It was not essential that Mrs. Wilder's identification be totally free from doubt as a prerequisite to admissibility."

People v. Jones, 553 P.2d 770(1976), held that even though the defendant was the only one in the lineup with a scar, the identification was not impermissibly suggestive. The court stated that claims of impermissibly suggestive pre-trial identification procedures must be evaluated in light of the totality of circumstances. In this case the defendant's picture didn't stand out from the other photos used. See also People v. Sanchez, 520 P.2d 751(1974), where a photo lineup was held to be impermissibly suggestive but nevertheless allowed an in court identification on the independant basis theory.

People v. Williams, 516 P.2d 114, rejected the "per se" suggestiveness rule in favor of the totality of circumstances-reliability rule in a one-on-one show-up case. Here the witness could not at first, identify the defendant at the one-on-one show-up. Before leaving the police station he did positively identify the defendant as the culprit.

People v. Knapp, 505 P.2d 7(1973), was a case where a three-man photo lineup was upheld, a 5th Amendment self-incrimination argument was rejected, a 6th Amendment Right to Counsel at photo display theory was rejected, and the court held that lineup cases should be decided on a case by case basis by the trial court.

Vigil v. People, 470 P.2d 837(1970), held that uncertainties and inconsistencies concerning identification

go to weight of evidence, not admissibility. The court said, "We have held on many occasions that it is not the duty of this court to superimpose its judgments or conclusions for those of a jury when determining the veracity of the identifying witnesses".

People v. Trujillo, Colo. App. No.76-542, decided November 3, 1977, held that a three photo lineup was admissible even though a show-up occurred shortly thereafter. Neither the photo lineup nor the one-on-one show-up were "per se" violations of due process. Both identifications were admissible under the totality of circumstances.

People v. Coston, Colo. App. No.76-921, decided November 10, 1977, addressed the issue of a "car lineup," in the following manner:

> "The defendant first contends that the trial court erred when it refused to suppress as evidence the identification of his car at the auto "lineup" as being similar to the car seen leaving the scene of the crime. We disagree with this contention.
> An item of real evidence is admissible if it is in some way connected with either the perpetrator of a crime, the victim, or the crime itself, People v. Penno, 188 Colo. 307, 534 P.2d 795(1975), and where, as here, a witness observes and subsequently describes an automobile for law enforcement officers, testimony as to the description and subsequent out-of-court identification may be introduced, See United States v. McKenzie, 414 F.2d 808 (3rd Cir. 1969), cert. denied sub nom., United States v. Anthony, 396 U.S. 1019, 90 S.Ct. 586, 24 L.ed.2d 510. Further, factors surrounding the identification, such as the suggestiveness of the "lineup", affect only the weight to be given to the evidence, not its admissibility. See McKenzie, supra. And, contrary to the defendant's contention, the presence of counsel is required only in certain instances of pre-trial confrontation of the accused with investigators or witnesses against him. See United States v. Ash, 413 U.S. 300, 93 S.Ct. 2568, 37 L.ed.2d 619 (1973); People v. Lowe, 184 Colo. 182, 519 P.2d 344 (1974). Thus, admission of the identification testimony was proper."

Armed with the facts presented to this court on the Carol DaRonch kidnapping case, it becomes apparent that she viewed hundreds of photos and only Mr. Bundy's was selected. The photographs used were not suggestive, there was an adequate number on each occasion; and there was no evidence

of police pressure exerted on Miss DaRonch to select Mr. Bundy's photo. Thus, there is nothing "impermissibly suggestive" about the photo displays under the U.S. Supreme Court, Utah or Colorado law. Even if the court should find some suggestiveness it definitely was not of a degree to "give rise to a very substantial likelihood of irreparable misidentification".

Furthermore, the subsequent physical lineup was fair, conducted pursuant to statute, with counsel, and for a legitimate purpose.

The grounds for the lineup were approved by the Utah trial court and would determine if Miss DaRonch could positively identify her attacker. Also, there was a substantial chance Mr. Bundy would be exonerated as not being the assailant.

Casting all that aside, if the court should find that the lineup and photo displays were impermissibly suggestive, it must view the identification under the totality of circumstances. The court has heard the circumstances and there is no real doubt that Miss DaRonch had an "independent basis" for making her identification.

II. Identification of defendant by Mrs. Harter

The Harter identification of Mr. Bundy being at the Wildwood Inn on January 12, 1975, is subject to the very same tests enunciated previously in the DaRonch part of this brief. The court has heard testimony that Mr. Bundy was picked out of a seven man photo lineup and again out of a single photo which contained eight men.

At the preliminary hearing, Mrs. Harter never actually pointed to Mr. Bundy and said "that's him." Because of this, the state must present law which allows her prior identification to be admitted as substantive evidence.

Starting with People v. Spinuzzi, 369 P.2d 427 (1962), the court held that "uncertainty of identification goes to its weight rather than its admissibility". See also Duran v. People, 427 P.2d 318. In this case, the witness was asked if he could identify the person holding the gun. The witness responded "Well, I am not sure, but I think I recognize him." At that point defense counsel objected, the court sustained the objection and the Supreme Court said keeping the identification out was error.

Three years later in Gallegos v. People 403 P.2d 864(1965), a very important case was decided by the Supreme Court of Colorado. Therein, the court said at p.868: "There is a growing body of law which recognizes the worthiness of an extrajudicial identification, and holds testimony thereof admissible." See also Dawkins v. Chavez, 285 P.2d 821. "As an exception to the hearsay rule, its application has been extended to the admission of the testimony of a third person who heard or observed the extrajudicial identification under consideration." See also DiCarlo v. U.S, 2nd Cir.,6F.2d 364, and Trujillo v. People, 146 P.2d 896. "And admissibility is particularly sanctioned in cases where the identifier testifies at trial." The next two paragraphs of the opinion encompass the reason for the rule: "That identification is

circumstantial and does not have the conclusiveness resulting from recognition of the persons charged; does not militate against the use of the rule... Uncertainty of identification under circumstances here present involves the weight to be given such testimony rather than its admissibility ... Whatever discrepencies or differences were shown to exist between testimony and extrajudicial identification could possibly cast doubt on the verity of one or the other, a matter conceivably advantageous to the two Gallegos." See also Cokley v. People, 449 P.2d 824, (1969), where at p. 827 the court states "error is also assigned to certin testimony of a police officer relating to the extrajudicial identification of the defendant at a so-called police lineup. It is claimed that the testimony of the police officer was hearsay. Suffice it to say that we perceive no prejudicial in this regard." (cites Gallegos v. People, supra as authority).

Then in Kurtz v. People, 494 P.2d 97(1972), the court held: "This jurisdiction permits extrajudicial identifications of a defendant as substantive evidence and as an exception to the hearsay rule. Further, we note that this exception has been extended to extrajudicial identifications heard or observed by a third person." The court cites Cokley and Gallegos, supra as authority.

One of the best Colorado cases dealing with failure to identify at a subsequent confrontation is People v. Trujillo, 539 P.2d 1234,(1975). There a witness named Dunhill was stabbed. The next day he was shown seven photos and he identified both of his assailants as being in the photo display. At a hearing, Dunhill was unable to positively identify the defendant. Because of Dunhill's inability to identify the defendant at the hearing, the earlier photographic identification was introduced into evidence. The defense protested and the court said, "Evidence of an extra-judicial identification is admissible, not only to corraborate an identification made at the trial...

but as independent evidence of identity...Evidence of an extra-judicial identification is admitted regardless of whether the testimonial identification is impeached, because the earlier identification has greater probative value then an identification made in the courtroom after the suggestions of others and the circumstances of the trial may have intervened to create a fancied recognition in the witness' mind."

Another case in point is People v. Pew, 543 P.2d 86 (1975). The pertinent part of the case is set out in its entirety.

> "Pew next contends that the trial court erred in refusing to strike Nichol's testimony because she did not make a courtroom identification of him and because the procedures employed in conducting the earlier photographic identification were unreasonably suggestive. He further complains that he was denied fundamental fairness since his lawyer was not present during the photographic identification proceedings.
>
> Nichol's testimony concerned only an earlier identification procedure in which she identified a photograph of the defendant as the man who had attempted to cash the forged payroll check. She testified that a detective, Iantorno, came to the store eleven days after the event, and showed her six photographs in succession, and that she immediately identified a photograph of the defendant as depicting the perpetrator of the offense. At no time, however, did the prosecutor ask Nichols to attempt a courtroom identification.
>
> We reject the claim that Nichol's testimony should have been stricken. If the witness is available for cross-examination at trial, the testimony as to a prior identification is admissible as independent evidence of identity, and not only to corraborate a courtroom identification. This is true even where there is no in-court identification by such witness. See People v. Gould, 54 Cal.2d 621, 7Cal.Rpts. 273, 354 P.2d 865.
>
> A further factor here is that at an in camera hearing prior to trial, testimony was presented that substantiated the trustworthiness of the earlier identification by Nichols and fully supported the trial court's conclusion that the photographic identification was free from impermissible suggestion. See Simmons v. United States, 390 U.S.377, 88 S.Ct.967, 19L.ed.2d 1247.
>
> There is no merit in the claim that counsel needed to be present during the identification proceedings. In Colorado, no right to counsel at photographic identification proceedings attaches during the investigatory stage of a criminal case." Brown v. People, 177 Colo. 397, 494 P.2d 587; People v. Renfro, 181 Colo. 159, 508 P.2d 396.

From the cases heretofore presented, it becomes evident that Mrs. Harter's pre-trial identification of Mr. Bundy is admissible as a matter of law. Even though admissible, her identification may be attacked by cross-examination at trial time and her answers will affect her credibility, thus affecting the strength of the identification.

Respectfully submitted,

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EXHIBITS

HARTER LINE-UP { PH-C LINE UP M-U — LINE UP
HH - B_1 - B-7.

AA 2 (MAP) X (SKI COUNTRY) Apt Sequim

Search Warrant in EX A - Mod —
Bill of Sale is B

D - Affid for Warrant. —

DA Pouch — 27 Photos — Thompson — Bundy 1

Line Up - Bundy EX K$_0$ + EX. D5 — BUNDY IN. HAS BUNDY

Hayward had already loaded

w/flashlight before he asked for

consent to "Look in

vehicle"

Forbes gave him Miranda

Rights before search warrant

signed

Blakey

IN THE DISTRICT COURT IN AND FOR

THE COUNTY OF PITKIN AND

STATE OF COLORADO

Criminal Action No. C-1616

THE PEOPLE OF THE STATE OF COLORADO, Plaintiff,	)	
vs.	)	BRIEF IN SUPPORT OF
THEODORE ROBERT BUNDY,	)	DEFENDANT'S MOTION TO SUPPRESS
Defendant.	)	IN-COURT IDENTIFICATIONS

FACTS

On November 8, 1974 a seventeen year old girl was abducted from the Fashion Place Mall in Murray, Utah at approximately 7:30 P.M. Her name is Carol DaRonch. On the evening in question she described her assailant as being in the neighborhood of 25 to 30 years old, about six feet tall and 175 pounds, brown hair, not really long and not really short, not curly, not straight and wearing a moustache. She was unable to give his eye color. She gave this description after having been with her assailant for approximately 20 minutes. It should be pointed out, however, that the first fifteen minutes or so were spent with Ms. DaRonch not knowing that a crime situation was involved. An apparently violent struggle took place, lasting just a few minutes, from which she escaped and was taken by a man and his wife to the police station.

After being brought to the police station and questioned at length, she was shown many photographs on the night in question and for several months thereafter. It was estimated that she viewed thousands of photographs during that period of time, never seeing a photo of her assailant but selecting a few with similar characteristics. This activity of the police showing her photos apparently subsided towards the end of 1974, having achieved nothing of value.

On January 12, 1975 Caryn Campbell disappeared from the vicinity of the Wildwood Inn in Snowmass, Colorado and her nude, partially decomposed, frozen body was found on February 17, 1975. During the days following her disappearance, other residents of the Wildwood Inn were contacted to learn whether any of them might shed

some light on the disappearance of the Campbell woman. Included among these persons was one Mrs. Lesbeth B. Harter who was staying with her husband and daughter on the same floor as the missing woman. She told the police on January 14, 1975 that two days earlier, when the Campbell woman disappeared, that she had stayed in her room that evening due to illness and neither heard nor saw anything unusual.

On August 16, 1975 Theodore Robert Bundy, the defendant, was arrested in Utah on a traffic offense. Due to certain items being found in his car at the time, he became a suspect in the DaRonch abduction. He was rearrested on August 21, 1975 on a charge of Possession of Burglary Tools, at which time he was questioned regarding the Murray incident and his home was searched. He also became a suspect in the Campbell homicide at that time.

EXHIBITS

Shortly after this arrest, the exact date being uncertain, Carol DaRonch was shown a photograph of the defendant, along with some other photos, by Det. Jerry Thompson of the Salt Lake County Sheriff's Office. At the same time he also showed her a photo of the defendant's 1968 biege Volkswagen "bug." Det. Thompson testified during this hearing that this photo confrontation took place at the Mountain Bell office where Ms. DaRonch was employed, on September 1, 1975. However the employment records of Mountain Bell show that Carol DaRonch was absent from work on that day due to it being a holiday.

Upon being shown the photo of the defendant's car, she replied "I believe that could be the Volkswagen, but I cannot make a positive identification...." When handed a stack of photos containing one of Mr. Bundy, she went through the stack, pulled his photo out, handed the stack back to Thompson, saying "I don't see anyone in there that resembles him." When questioned by Thompson about the one remaining in her hand she said "Oh, here." He then asked her if that was the guy or why she pulled it out she stated, "I don't know, aah, I guess it looks something like him." She told him that she didn't think she could identify him if she saw him again or not. Det. Thompson left that interview with the opinion that she was a very poor witness and didn't know whether she would be able to identify the individual again.

Det. Thompson wrote the above down in a report which was introduced in this hearing as Exhibit 7. However he also wrote a different report of the same incident, but unfortunately not containing the same version of the facts. In this altered version of the incident he writes that she felt rather confident that she could identify her assailant. Also unfortunately, it was this latter version of the incident that was turned over to the defense in Utah for preparation of the kidnapping charge there. No plausible explanation for the discrepancy was offered by Thompson at the hearing. Thus, the logical conclusion that must be drawn is that he doctored his report in order to improve the chances for a conviction on the Utah charge and withheld the truth from the defense.

The reason for this becomes apparent when it is learned that very shortly after Thompson showed his photos to DaRonch, he turned over a different photo of Bundy to the Bountiful police officers who immediately took this and other photos out to DaRonch again. The only person who appeared in this who had also appeared in the group showed her by Thompson a day or two earlier was Thoedore Bundy. During this time she had also been taken out to try to identify a VW which had belonged to Bundy. There appeared to be much frantic activity on the part of law enforcement officers around this time, as they obviously felt they had a suspect. On being shown Bundy's photo on this second occasion, she allegedly identified him, although a day or two earlier she had told Thompson she didn't think she would be able to do so.

On January 9, 1976 Michael Fisher, Investigator for the District Attorney's office in Aspen showed the same Mrs. Lesbeth Harter a group of photos including that of the defendant. When she came to his photo she asked him how tall this person was. When asked why, she replied "this is the strange man by the elevator." She said her attention had been drawn to this individual as she walked by the elevator because he was dressed out of character for a ski lodge. She testified at the preliminary hearing that she observed two men near the elevator, one right near and one standing back a ways. When asked if either of the men who had been near the elevator were present in the courtroom she proceeded to identify Undersheriff Ben Meyers as looking similar to the man nearest the elevator. She said the

lighting had been poor and she was just going on general characteristics. At no time did she identify the defendant, who was present in the courtroom and in her view during all her testimony, as being one of the men who she had seen near the elevator on the day in question.

At the hearing on this motion Carol DaRonch identified the defendant as being the person who abducted her in November 1974. It is this identification, and any further in-court identifications of the defendant that might occur in the future by this witness, that is the subject of this motion. It is contended that any in-court identification of the defendant by Carol DaRonch was so tainted by the impermissibly suggestive photo displays previously shown her as to give rise to a very substantial liklihood of irreparable misidentification.

On October 1, 1975 Carol DaRonch viewed a line-up in which the defendant was present and selected him as her abductor. The same reasoning applies to this identification and it must also be suppressed since it too was so tainted by the impermissibly suggestive photo displays as to give rise to a substantial liklihood of irreparable misidentification.

The photo identification of Bundy by Mrs. Harter turns out to be so incredible in light of her misidentification of Meyers and her non-identification of the defendant at the preliminary hearing as to warrant its exclusion as a matter of law.

LAW

The law in the area of suggestibility of photographic displays and how they affect a subsequent in-court identification comes down to us from the leading case in the field, Simmons v. United States, 390 U.S. 377, 19 L. Ed. 2d 1247, 88 S. Ct. 967(1968). In that case, two men held up a bank at gunpoint, neither wearing masks and remaining on the premises for about five minutes. Shortly thereafter, the police, through tracking a car seen leaving the area after the robbery, obtained snapshots of one of the alleged perpetrators, which they then showed to the five employees who all identified the defendant Simmons. The snapshots were of him among a group of other people. Later three of the employees identified his co-defendant Garret from other photos.

During the trial, all five employees identified Simmons and the same three identified Garret and both were convicted. On appeal the defendants asserted that the pretrial identification by means of photos was so unnecessarily suggestive and conducive to misidentification as to deny them due process of the law. The Court, coming on the heels of it's decisions in Wade, Gilbert and Stovall, held that the claim must be evaluated in light of the totality of the surrounding circumstances. The Court recognized "that improper employment of photographs by police may sometimes couse witnesses to err in identifying criminals. A witness may have obtained only a brief glimpse of a criminal, or may have seen him under poor conditions. Even if the police subsequently follow the most correct photographic identification procedures and show him the pictures of a number of individuals without indication whom they suspect, there is some danger that the witness may make an incorrect identification....The chance of misidentification is also heightened if the police indicate to the witness that they have other evidence that one of the persons pictured committed the crime. Regardless of how the initial misidentification comes about, the witness thereafter is apt to retain in his memory the image of the photograph rather than of the person actually seen, reducing the trustworthiness of subsequent lineup or courtroom identification." p.383 (emphasis added)

The Court held "each case must be considered on its own facts, and that convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial liklihood of irreparable misidentification." p.384

Under Colorado law, it is the burden of the People to show by clear and convincing evidence that any suggestion was not present and that the identification was the product of the victims own recollection. See Stewart v. People, Colo., 487 P.2d 371; Martinez v. People, Colo., 482 P.2d 375; Constantine v. People, Colo., 495 P.2d 208(1972). The totality of the surrounding circumstances is also the test under our law. See Phillips v. People, 170 Colo. 520, 462 P.2d 594; People v. Jones, Colo., 553 P.2d 770(1976).

ARGUMENT

Eyewitness identification has been the subject of much abuse by law enforcement officials over the years and until approximately ten years ago its admissibility in court was always assumed, the abuses going to the weight of the identification and not to its admissibility. With the decisions in Wade, Gilbert, Stovall and Simmons, supra, the United States Supreme Court held that sometimes the abuses can reach such proportions as to create a denial of due process of the law to an accused. In such cases the courts are bound to deny the People the right to introduce evidence at trial which relates to impermissibly suggestive procedures and any identifications which occur as a result thereof. The instant case is a perfect example of such a case.

When Carol DaRonch was first confronted with a photograph of the defendant she told Det. Thompson that she guessed it looked something like her abductor but that she didn't think she would be able to identify such person again. Even though Thompson thought she was a "very poor witness" and she had failed to identify Bundy as her abductor, he did not let his efforts end there. In conjunction with the Bountiful police, he was instrumental in having her shown another photo of the defendant along with her being shown several photos of his car and also being taken out to see his car on several occasions. It must have been apparent to her that the police had a "hot suspect" on their hands, or else what explanation for the frenzied activity over the course of a few days. The police managed to confuse her so that when she saw the defendant's car on the street what she was actually identifying was the car she had seen so many times in police photos. As a matter of fact, the car she identified was not even the same color as the car she had originally described to the police at the time of her abduction. For ten months after her abduction the police were looking for a white or light blue VW but when Bundy was arrested and his car turned out to be light brown, suddenly the suspect vehicle changed color to correspond to Bundy's car. Light brown had never been mentioned as a possible color until he was arrested and suddenly everyone was talking as if they had been looking for such a color VW all along.

Upon seeing the defendant's picture for the second time in a day or so and having been taken out to see his car during that period

she obviuosly became aware that this was in fact the "hot suspect." This was probably not a conscious reaction on her part but there is usually pressure on a victim to make an identification, even more so where the police have a suspect in mind. Even they might not consciously attempt to influence the identification, but their actions certainly can have that effect. The facts of this case are not that far off from those of Foster v. California, 394 U.S. 440, 22 L.Ed. 2d 402, 89 S.Ct. 1127(1969). In that case a witness failed to identify the defendant the first time he confronted him, despite a suggestive lineup. Police then arranged a showup, at which time the witness was able to make a tentative identification. At yet another lineup the witness was finally able to muster up a definite identification. The court held that all of the identifications were inadmissible, observing that they were "all but inevitable" under the circumstances. p.443.

Although the facts in the instant case are not as blatant from the record, the logical conclusion is that the identification of the defendant in this case was also "all but inevitable."

Eyewitness identifications are not as reliable as might at first be believed. There sit many a man in prison, having been convicted based on mistaken identifications. In an article by William J. Bryan, Jr. in the California Trial Lawyers Journal, vol. 10, n. 2, p. 50, the author sets forth fifteen danger signals in eyewitness identifications. Six of these are relevant to the instant case and they are as follows:

1. Witness originally stated he would be unable to identify the perpetrator.

2. A serious discrepancy exists between identifying witness' original description and actual description of the defendant.

3. During the original observation of the perpetrator the witness was unaware that a crime situation was involved.

4. The identification contains inaccuracies about the person identified.

5. Witnesses place the defendant in two different situations at the same time.

6. A considerable period of time elapsed between the witness' view of the criminal and identification of the defendant.

The issue we are discussing now is that of reliability of the identification as that seems to be the test for admissibility although it is phrased in many ways. What we are trying to determine is how reliable is Carol DaRonch's identification of the defendant. A closer look at the facts will reveal that it is certainly not the kind courts like to see. First of all, her initial description of her assailant sufferred from much vagueness such as color of eyes, length of hair, texture of hair and presence of facial hair. This latter seems to be the most striking point for at first she described her assailant as sporting a moustache, a few days later changing that to lack of facial hair and then by the trial, changing back to her original description. Also the description of the defendant's car changed along with the circumstances.

Ten months after the crime, when faced with a photo of the defendant she tells Thompson she doesn't think she can identify her abductor yet a day or two later makes what the police term a positive identification. What happened during that period of time is certainly not entirely contained in the record, but it is certain something suggestive must have occurred in order to see this sudden turn-about.

The burden does not rest with the defendant to show exactly what suggestive procedures were used, but with the People to show by clear and convincing evidence that any suggestion was not present and that the identification was the product of the victim's own recollection. Stewart v. People, supra; Martinez v. People, supra; Constantine v. People, supra. The People have obviously failed to meet this burden as it is apparent from the testimony that Carol DaRonch certainly did not make her identifiaction of the defendant based on her own recollection, but based on the suggestive procedures used between August 16, 1975 and early September 1975.

Once the photo identification of the defendant was accomplished, it was a simple matter to bolster that with a lineup identification, which the police did early in October of that year. DaRonch testified that she recognized the defendant by his walk as soon as he walked out into the lineup. That was what struck her she said, although she was unable to describe anything unusual about the way he alked. As a matter of fact, she originally told police that there wasn't anything unusual about the way her assailant walked. It is apparent that her identification of the defendant in the lineup was based on her

previous photo identification which had been elicited by the police through impermissibly suggestive means. These means give rise to a very substantial liklihood of irreparable misidentification.

What we are asked to do is to examine the totality of the surrounding circumstances of Carol DaRonch's identification of Bundy, by photo, by lineup and in court. A fair examination of these circumstances can only lead one to the conclusion that the identifications were not based on the victim's own recollection but on suggestive means employed by the police. Her identifications have a very low degree of reliability and must be excluded from evidence. [COMMENT ON POOR WITNESS]

Another factor to be considered is that one Raylene Shepard places the defendant some twenty-five miles away from the DaRonch crime scene only ten to fifteen minutes after the crime occurred, merely adding to the unreliability of the DaRonch identification.

As far as the identification of the defendant's photo by Lesbeth Harter, this is another case where the court must exercise its power to exclude legally incompetent evidence. The People will surely argue that this is a question of weight, not admissibility. However, the Supreme Court has already determined that some evidence never reaches a threshhold that places it within our constitutional framework and its introduction into evidence works a denial of due process of law to the defendant. Mrs. Harter, when faced with the presence of the defendant, was unable to recognize him even though she had previously chosen a photo of him. She had not observed the photo until one year after she had seen a man for a few seconds. Surely this identification comes nowhere near reaching the threshhold of competent evidence and should be excluded as a matter of law.

Respectfully submitted,

Kenneth Dresner

Kenneth Dresner
Advisory Counsel to Defendant
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Gunnison, Colorado 81230
(303) 641-1444

I have served a copy of the within Brief upon the People in this case by personally handing a copy of same to _____ on the _____ day of December, 1977.

_____

EXHIBIT "A"

of the questioning, at which time he shall either return it, if lawfully possessed, or arrest such person.

History: L. 1967, ch. 203, § 3.

Compiler's Notes.

The reference in this section to "section 77-13-34" appeared in the act as "paragraph (2), above."

77-13-36. Peace officer's authority beyond limits of normal jurisdiction. —(1) Any peace officer duly authorized by any governmental entity of this state may exercise a peace officer's authority beyond the limits of such officer's normal jurisdiction as follows:

(a) When in fresh pursuit of an offender for the purpose of arresting and holding that person in custody or returning the suspect to the jurisdiction where the offense was committed.

(b) When a public offense is committed in such officer's presence.

(c) When participating in an investigation of criminal activity which originated in such officer's normal jurisdiction in co-operation with the local authority.

(d) When called to assist peace officers of another jurisdiction.

(2) Any peace officer, prior to taking such authorized action, shall notify and receive approval of the local law enforcement authority, or if such prior contact is not reasonably possible, notify the local law enforcement authority as soon as reasonably possible. Unless specifically requested to aid a police officer of another jurisdiction or otherwise as provided for by law, no legal responsibility for a police officer's actions outside his normal jurisdiction and as provided herein, shall attach to the local law enforcement authority.

History: L. 1971, ch. 208, § 1; 1975, ch. 37, § 1.

Compiler's Notes.

The 1975 amendment rewrote this section which, prior to amendment, read: "Any peace officer of the state of Utah, while attempting to effect an arrest for a public offense may cross jurisdictional boundaries within the state when in fresh pursuit of an offender for the purpose of arresting and holding that person in custody or returning him to the jurisdiction where the offense was committed and take all other necessary measures that could be taken in his own jurisdiction."

Title of Act.

An act relating to pursuit by peace officers; authorizing peace officers attempting to effect an arrest to cross jurisdictional boundaries within this state if in pursuit of one suspected of committing a public offense.—Laws 1971, ch. 208.

77-13-37. Line-up procedures—Order of magistrate—Arrested suspect's appearance without order.—(1) A magistrate may issue an order, to be executed by a peace officer, requiring a suspect to appear in a line-up when there is probable cause to believe that a crime has been committed and reason to believe that the suspect committed it.

(2) A suspect that has been arrested and is in custody may be required by a peace officer to appear in a line-up without a court order having been issued.

History: L. 1971, ch. 198, § 1.

Title of Act.

An act relating to criminal line-ups; providing for the issuance of orders compelling appearance at line-ups; and establishing line-up procedures.

77-13-38. Line-up procedures—Suspect's right to have attorney present.—A suspect has the right to have his attorney present at a line-up, and the magistrate shall notify the suspect of this right. Every person that is unable to employ counsel shall have representation by an attorney appointed by the magistrate for purposes of the line-up.

History: L. 1971, ch. 198, § 2.

Identification at the scene.

This section applies to line-ups; it does not require the presence of an attorney for an accused who is presented to the victim for identification less than one block from the scene of the crime, and within ten to fifteen minutes of its commission. State v. Allen, 29 U. (2d) 442, 511 P. 2d 159.

77-13-39. Line-up procedures—Conduct of peace officers—Record of proceedings.—The peace officers conducting a line-up shall not attempt to influence the identification of any particular suspect in the line-up. The entire line-up procedure shall be a hearing of record, including all conversations between the witnesses and the conducting peace officers. The suspect shall have access to the record taken at a line-up and shall have access to copies of any photographs taken of the suspect or any other persons in connection with a line-up.

History: L. 1971, ch. 198, § 3.

CHAPTER 15—PRELIMINARY EXAMINATIONS

77-15-1. Magistrate to inform prisoner of charge and of his rights.

Right to aid of counsel.

Confession is not inadmissible in evidence merely because defendant was immature and without advice of counsel, friends or relatives when it was made. State v. Braasch, 119 U. 450, 229 P. 2d 289.

A defendant was not entitled to a reversal of an automobile homicide conviction because he was taken into custody and questioned by police officers and a justice of the peace during the first two hours following the accident without being advised of his right to the aid of counsel or told that his statements might be used against him. State v. Nelson, 12 U. (2d) 177, 364 P. 2d 409.

Trial court did not err in denying defendant's motion for second preliminary hearing upon appointment of new counsel, since purpose of preliminary hearing is for magistrate to determine probable cause and not discovery of evidence. State v. McGee, 24 U. (2d) 396, 473 P. 2d 388.

Held, that the right to counsel at the arraignment and at the time the defendants entered their pleas is not understandingly, intelligently, or competently waived where they were not informed that their pleas would waive errors in prior proceedings arising out of a denial of their right to counsel arising out of self incrimination in the absence of counsel, or any other defect or irregularity. Application of Sullivan, 126 F. Supp. 564.

The right to counsel is not limited to counsel at a trial but it is a right to have counsel at every stage of the proceeding. Application of Sullivan, 126 F. Supp. 564.

Law Reviews.

The Right to be Provided Counsel: Variations on a Familiar Theme, by Lester J. Mazor, 9 Utah Law Review 50.

77-15-2. Time and messages allowed to procure counsel.

In general.

Cited or applied in Application of Sullivan, 126 F. Supp. 564.

77-15-4. Change of pla

In general.

Cited in Pons v. Faux, 1 P. 2d 407.

77-15-12. Exclusion a

Separation of witnesses.

Failure of trial court t nesses excluded from co trial to keep apart and n other did not constitute

77-15-13. Exclusio also, upon the reques every person except torney general, the c the officer having the d

History: R. S. 1898 § 4669; C. L. 1917, § 8749 C. 1943, 105-15-13; L. 197

Compiler's Notes.

The 1973 amendment to "district attorney."

77-15-14. When trans

Transcript of stenographe transcript.

Where the record of p mony did not state the fession of a witness as r (1) of this section, such error as defendant could

77-15-15. Custody an

Release of stolen property

Wall plaque stolen by properly admitted into e despite fact it had been

77-15-19. Defendant h

Failure to sign order.

Failure of magistrate binding over defendant f

77-15-29. Examinatio

In general.

Cited or applied in Ba

77-15-31. Testimony t

In general.

Cited or applied in Ba

EXHIBIT "C"

R. PAUL VAN DAM
COUNTY ATTORNEY
By: W. R. HYDE
Deputy County Attorney
C-220 Metropolitan Hall of Justice
Salt Lake City, Utah 84111
Telephone: 532-7077

FILED IN CLERK'S OFFICE
Salt Lake County, Utah

OCT 1 1975

W. Sterling Evans, Clerk 3rd Dist. Court
By _____
Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT, IN AND FOR THE COUNTY OF SALT LAKE, STATE OF UTAH

THE STATE OF UTAH :
IN THE MATTER OF THE APPEARANCE : ORDER TO APPEAR
OF THEODORE R. BUNDY : Misc 5-242

YOU ARE COMMANDED to appear before the Honorable Peter F. Leary, a Judge of the Third Judicial District Court in and for the County of Salt Lake, State of Utah at the Metropolitan Hall of Justice on the 2nd day of October, 1975 at 9:30 o'clock A.M., then and there to participate as a subject in a line-up, there having been set forth probable cause to believe that a crime has been committed and reason to believe that Theodore R. Bundy may have committed the same. You are hereby advised that you have a right to have counsel present during this line-up. If you cannot afford counsel, counsel will be provided for you.

Disobedience will be punished as a contempt of the above court.

Given under my hand this 1st day of Oct, 1975.

ATTEST
W. STERLING EVANS
CLERK
BY _____
Deputy Clerk

_____
JUDGE

COURT: I suppose you can have somebody sworn and testify in connection with the matter and set forth what, essentially what you are going to need to show the probable cause, and--

MR. HYDE: Could we ask one more thing before we do this, that we have none of this released to the press?

COURT: I assume that was --

MR. HYDE: It may be inherent in what we are doing, but I would like the instruction from the Court, nothing about this goes out to the press until we get the man before the court.

COURT: That will be the instruction. Tell them to go ahead and present your evidence and as to the other things I want to talk to you afterwards.

MR. HYDE: I would like the affiant, Officer Jerry Thompson, Salt Lake County Sheriff's office.

(Witness sworn by the Judge.)

Officer Thompson, you are appearing today before Judge Peter F. Leary, Third District Court, to be the affiant in a requested Order of Appearance for Theodore Bundi for a lineup, is that correct?

A. Yes sir.

Q. Are you familiar with the event in regard to the kidnapping of one Carolyn Darounch, in Murray in November of 1974?

A. Yes, I am.

Q. Is the purpose of this lineup to require Mr. Bundi to appear in regard to that case for an identification by the victim, Miss Darounch in regard to that kidnapping?

A. Yes, it is.

Q. Mr. Thompson, have you had occasion to talk to Mis Darounch concerning the events of that evening?

A. Yes, I have.

Q. Would you give the court the date of that event, date the kidnapping occurred?

A. November 8, 1974

Q. And where did it occur?

A. It was at the Fashion Place Mall in Murray.

Q. Would you describe the vehicle that was described to you concerning this event in regard to the suspect's use of that vehicle?

CAR

A. It was described at that time as an older model Volkswagen bug, light in color, white or light brown, it was also described as not having a front bumper or front license plate and the most distinct thing she could recall about it was in the back seat the top part had a large tear in it and the stuffing was comong out of it.

Q. Is this the back seat?

A. This is the back seat and it's the top of the back seat which is visible through the back window.

Q. Okay, would yku describe what occurred in regard to this vehicle and the event of the kidnapping?

A. Since that time and individual was arrested by the Utah Highway Patrol on a charge--

Q. That individual being whom?

A. That individial being a Theodore Bundi, the Volks wagen this individal had that night matched this description and also in that vehicle-

Q. Would you describe how it matched the description please?

A. It was a light in color, I would say either a Gray or light tan color, the back seat did have the tear across the top with the stuffing coming out of it, there was no bumper and there was no front license plate on the front of that vehicle, that was all.

Q. Was that vhhicle subsequently located in another par

Theodore Bundi concerning this vehicle?

A. Hes, I did.

Q. And did, to your knowledge did the vehicle victim, Miss D rounch have an opportunity to view such vehicle?

A Yes she has.

Q. And can you indicate what the result of that viewing was?

A. That in her opinion that was the vehicle, that it was used that particular night, however the time of the viewing the back seat had since been changed or fixed.

Q. Did you previously to this viewing talk to Mr. Bunci about this vehicle?

A Yes, I have.

Q. And have you taken pictures of it in a previous state?

A. I had taken pictures with it in the previous state with Mr. Bundi's permission.

Q. What subsequently happened to that vehicle?

A The vehicle since that time, the back seat has either been fixed or replaced with another one, the pumper and license plate have been replaced on the front of the vehicle and the hubcaps ~~of~~ have been changed and the outward appearance has been changed in my opinion to either have been freshly painted to a maybe a darker tan in color or it's possible that it may have been waxed, I don't know, but it did appear different point to me.

Q. Does Mr. Bundi still own that vehicle?

A. No, he doesn't.

Q. Have you had occasion, are you award of occasions where Mr. Bundi's photograph has been displayed to Miss Darounch?

A. Yes.

Q. And could you describe the first event that you are aware of in regard to this photograph?

A. The first event was at her place of work in Mountain Bell, telephone where I had the arrest photo of Mr. Bundi in a packet of probably 30 to 40 individuals and I had her go through this packet of pictures

All of the picutres except Mr. Bundi's, she said "I don't see anyone in there" then I asked her what about the one what was in her hand and she stated "This one, I don't know I guess it looks the most like the individual, but I'm not sure".

Q. To your knowledge ~~Do you remember this~~, was there any other photographic display?

A. Yes, a driver's license photow was obtained and show to her by some Bountiful officers in a group of pictures and she pulled Mr. Bundi's picture out of this also stating tha she believed that was the individual.

Q. Could you describe the description Miss Darounch gave you or gave the police authorities of the spspect of the kidnapping on the evening of November 8th?

A. As I recall she described the individual as close to 6 foot, about 170 pounds, 180, having brown hair, over the ears, other than that I don't recall the rest without referring to my notes.

Q. Would you describe your observarion of Mr. Bundi?

A. Mr. Bundi is 6 feet tall, 175 to 185 pounds, has brown hair, combed over the ears, at this time he is clean shaven.

Q. Anything else?

MR. YOCOM: Officer Thompson, would you describe the event that occurred with Miss Darounch on the 8th of November? What happened to her?

A According to her she was in the Fashion Place Mall, an individual approached her and under the pretense that he was a Murray police officer he gave her the name of Rallins or she thought, oanted her to come out to her vehicle, that it had been broken into by some individuals and they wanted her to check the vehicle over. During this course they walked down the inside of the mall as a pretense of finding a Murray substation where he sahd that there were fellow officers waiting, they went to a door which was, I don't recall whether it was a laundromat or something that was closed, just a

"I'll take you down there," they then walked through and out to I believe it's 6100 South there by J.B.'s; he opened the door of a Volkswagen, got her to get in, he got in at that time, she became more suspicious and asked for some more I.D., he then showed her what she described as a shield type bade, did not get any reading on it at all, he then asked her to put a seat belt on her that he was very safety minded and he didn't want anyone in his car without one, she told him no, that she wasn't going to put one on that she became extremely frightened at that time, the vehicle drove then east on 6100 South, made a turn, I don't recall the street where they got by a elementary schook, at that time a stuggel insued between them, the individual attempted to put handcuffs on the victim, he did get the handcuffs on her, but got both of them on the same arm, I'm not sure which came first, I believe i he then displayed a small caliber pistol, threatened her with this, shem then managed to get out of the vehicle, the individual then came out of the vehicle with what she thought was some typ of a bar, a crow bar or jack handle or something, came at her with it, a struggle insued at this time, a vehicke came down the road, with it's lights on, the subject then turned and got in his vehicke and drove a way.

YOCOM: That's all I have.

Ct Finds

COURT: The Court finds that there is probably cause to believe the crime has been committed and reason to believe that the suspect committed it and I will issue an order that the suspect appear for a lineup.

HYDE: I will have the order prepared in the case that he is to appear tomorrow morning onxxh at 9:30 at this building for lineup and advise him of his rights to counsel in regard to that pursuant to the statutory requirement

EXHIBIT "C"

(B)

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT IN AND FOR THE COUNTY OF SALT LAKE, STATE OF UTAH

* * * * * *

THE STATE OF UTAH IN THE MATTER OF THE APPEARANCE OF THEODORE R. BUNDY	REPORTER'S TRANSCRIPT MISC. 5-242

BE IT REMEMBERED that on the 2nd day of October, 1975, at the hour of 9:00 the above named defendant appeared before the Honorable Peter F. Leary, Judge, together with his attorney, John D. O'Connell; the State of Utah represented by William R. Hyde, deputy county attorney.

WHEREUPON, the following proceedings were had:

C.S.R. License #93

MR. HYDE: May we have the benefit of the record on the order for lineup appearance issued yesterday? I think Mr. O'Connell would like the record to reflect that his dient has appeared pursuant to that order and prepared to stand in the lineup.

MR. O'CONNELL: I would like to state an objection. the Order issued by the court, I have a copy here, if you would like a copy, Your Honor, states that "there having been set forth probable cause to believe that a crime has been committed, and reason to believe that Theodore Bundy may have committed the same". The statute reads "that probable cause that a crime has been committed, and reason to believe that the suspect committed it". That may have interjected into words of art, "reason to believe" or "reasonable cause to believe" are words of art and to put a "may have" in the middle, I believe on the face the Order is not in compliance with the statute which gives the authority for issuance of the Order.

COURT: Well, I don't know that that is exactly what I found, I think that I found there was reason to believe a crime has been committed and reason to believe that he committed it, so if you want the Order amended I will be happy to do that.

MR. O'CONNELL: Was this done on the basis of affidavit or testimony?

COURT: Testimony.

MR. HYDE: The Court defined at the time there was reason to believe that the suspect was--

COURT: I don't recall.

MR. HYDE: I think that is on the record.

COURT: I don't know how "may have" got in there, but I don't think that was my finding.

MR. O'CONNELL: This was a matter, a hearing of record?

COURT: It was a hearing of record.

MR. O'CONNELL: Thanks, and is it the Court's order Mr. Bundy go down with the law enforcement officer and comply with the instructions in the record as to the lineup?

COURT: Yes sir.

C E R T I F I C A T E

STATE OF UTAH)
: ss.
COUNTY OF SALT LAKE)

I, Penny C. Miller, do hereby certify that I am a Certified Shorthand Reporter, and Notary Public, in and for the State of Utah. That on the 2nd day of October, 1975, I reported the preceding matter in relation to Misc. #5-242, and that the transcription of said record is true and correct to the best of my knowledge and ability, as set forth in pages 1 through 4, inclusive.

Dated this 20th day of January, 1976.

Penny C. Miller
Certified Shorthand Reporter and
Notary Public

My Commission Expires
October 17, 1976

EXHIBIT "D"

POINT I

APPELLANT WAS IDENTIFIED AS A RESULT OF SOUND POLICE PROCEDURES WHICH COMPORTED WITH THE DUE PROCESS REQUIREMENTS OF THE FOURTEENTH AMENDMENT.

Appellant contends that the police obtained an identification of him by Miss DaRonch as a result of "unnecessarily suggestive" police procedures which resulted in "irreparable mistaken identification." Respondent submits, under the circumstances of this case, the police identification procedures fully comported with due process requirements as outlined by this Court and the Federal Courts.

Perhaps the genesis of the modern rule concerning out-of-court identification as it relates to due process is found in Stovall v. Denno, 388 U.S. 293 (1967). In that case a man stabbed a woman eleven times. The defendant was taken to a hospital where the victim had just completed surgery. There, handcuffed and surrounded by five police officers, an identification was made. In upholding the defendant's conviction the Court established the rule by which subsequent cases are to be decided. They asked:

> "[Is the] confrontation conducted in this case . . . so unnecessarily suggestive and condusive to irreparable mistaken identification that [the defendant] was denied due process of law?" 388 U.S. at 302.

Further the Court said:

> ". . . a claimed violation due process of law in the conduct of a confrontation depends on the totality of the circumstances surrounding it. . . ."

In other words, the test is whether in light of the circumstances of the case, the identification procedure is unnecessarily suggestive. Then, if so, is it also condusive to irreparable mistaken identification?

The Stovall case involved a "show-up" whereas the instant case is mainly concerned with photographic identification and a lineup. However, in Simmons v. United States, 390 U.S. 377 (1968), the Supreme Court extended the Stovall rule to include identifications secured through the use of photographs. That case involved a bank robbery after which witnesses were shown some snapshots of the defendant and others. Later, the witnesses viewed an indeterminate number of pictures. The Court noted:

> "Despite the hazards of initial identification by photograph, this procedure has been used widely and effectively in criminal law enforcement

> from the standpoint both of apprehending offenders and of sparing innocent suspects the ignominy of arrest by allowing eyewitnesses to exhonerate them through scrutiny of photographs." 395 U.S. at 384.

After describing the use of photographs as an effective law enforcement procedure the Court upheld the conviction, adopting the Stovall test and applying it to the use of photographs:

> ". . . we hold that each case must be considered on its own facts, and that convictions based on eyewitness identification at trial following a pretrial identification by photographs will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." Id. at .

The Supreme Court then listed several circumstances which would indicate a necessity for the use of photographs. First, a serious felony had been committed; second, the perpetrator was still at large; third, inconclusive clues pointed towards the defendant; fourth, it was necessary to act quickly; fifth, the crime scene was well lit; sixth, the perpetrator wore no mask; seventh, the witnesses had observed the perpetrator for up to five minutes; eighth, the photographs were shown one day later; ninth, at least six photos were shown to each witness; tenth, the witness was alone when viewing the photos; and eleventh, there was no evidence to indicate

whether any persons were under suspicion. 390 U.S. at 384-385. Respondent will show infra that all but one of these circumstances existed in the instant case.

The Utah Supreme Court has always approved the use of photographic identification in law enforcement. In State v. Jenkins, 523 P.2d 1232 (Utah, 1974), this Court said:

> "The use of photographs is recognized as a proper and practical means of searching out persons suspected of crime which has been used effectively for many years." 523 P.2d at 1233.

This Court has also said that law enforcement officers need to use these types of procedures so that justice is done:

> ". . . police officers should not be unduly hampered in legitimate attempts to investigate crimes and to seek out and identify those who have committed them." State v. Perry, 27 Utah 2d 48, 492 P.2d 1349 (1972).

The Utah Supreme Court has adopted a test very similar to that used by the United States Supreme Court, and has at times cited the latter court's test with approval. In State v. Perry, supra, this Court said:

> ". . . the circumstances of the individual case should be scrutinized carefully by the trial court to see whether in the identification procedure there was anything done which should be regarded as so suggestive and persuasive that there is a reasonable likelihood that

> the identification was not a genuine product of the knowledge and recollection of the witness, but was something so distorted or tainted that in fairness and justness the guilt or innocence of an accused should not be allowed to be tested thereby." 492 P.2d at 1352.

As a corollary it must also be noted that the prime responsibility for making the determination of whether or not a photographic identification was irreparably suggestive rests upon the trial court:

> "This is something which because of his recognized prerogatives and advantaged position with respect to the trial, it is primarily the responsibility of the trial court to make the determination, which should not be disturbed unless it appears clearly that he was in error." Id. at

This is because the determination goes to the weight of the testimony, not its admissiblity. As the United States Supreme Court said in Simmons, supra:

> "The danger that use of the technique may result in convictions based on misidentification may be substantially lessened by a course of cross-examination at trial which exposes to the jury the method's potential for error." 390 U.S. at 384.

In other words, the trial court may receive the identification, listen to the defendant's contentions of prejudice, and then weigh the evidence accordingly.

This Court has not catalogued which circumstances would favorably support the use of photographic identification, or which procedures will be upheld but an examination of several cases answers both questions.

In State v. Ek, 526 P.2d 359 (Utah, 1974), a victim was shown a single picture of the defendant and was then taken to view him in a hospital. The Court held, "there was nothing improper about the method used to secure the identification." 526 P.2d at 359.

In State v. Wettstein, 28 Utah 2d 295, 501 P.2d 1084 (1972), a witness was shown the defendant's photograph in a group of seven or eight. Later the witness was shown the defendant's photograph in another group and later in still another. Finally, the witness viewed the defendant through a two-way mirror at the police station. This Court held that the procedure comported with Stovall.

In State v. Gilpin, 24 Utah 2d 107, 466 P.2d 834 (1970), cert. den. 400 U.S. 847, the victim viewed the defendant in a lineup but could not identify him. Officers later took her to a courtroom where the defendant was on the witness stand. She said the man on the witness stand might be the criminal. Finally, she saw him again at the preliminary hearing and made a positive identification. This Court held:

> "We are of the opinion that the identification of the defendant prior to trial, and the circumstances surrounding the confrontation were not suggestive as to the defendant's identity as a participant in the robbery, and we do not conclude that they were made under conditions of unfairness or unreliability." 466 P.2d at 836.

From the above cases, it is established that (1) it is proper to use photos for identification purposes; (2) it is permissible to show multiple photos of a suspect to a witness; (3) and it is permissible to follow a photo identification with a lineup.

FACT STATEMENT DELETED AS COURT MUST REFER TO FACTS IN EVIDENCE

Applying the law to the facts, People submit that the identification procedure used in this case was not unnecessarily suggestive. When this case is measured against the criteria of the Simmons case, it

is apparent that the procedures fully comported with due process requirements. First, a serious felony had been committed; second, the perpetrator was still at large; third, clues were pointing toward appellant; fourth, it was necessary to act quickly; fifth, the crime scene had been well lit; sixth, the perpetrator wore no mask; seventh, the witness had observed the perpetrator for more than five minutes; eighth, at least six photos were shown to Miss DaRonch; ninth, Miss DaRonch viewed the photos alone; tenth, the police did not indicate whether any of the persons in the photos were under suspicion.

In all the above areas, the circumstances at least meet the criteria given as a guide by Simmons. In some areas, the guidelines are exceeded. For example, Miss DaRonch was with her captor longer than five minutes . Clearly, more than six photos were viewed by Miss DaRonch; in fact, she viewed thousands . She only saw two photos of appellant, whereas the witness in Simmons saw more than that number of the defendant in that case (390 U.S. 384-385).

The only Simmons guideline that is not met is the time element. Miss DaRonch viewed the photographs about nine months after the crime. However, in Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375 (1972), a woman was raped. She was shown numerous photographs but never made an identification. Seven months later the victim was taken to the police station where two detectives walked the defendant into her view and had him say some words. An identification was made (93 S.Ct. at 380), which the Court upheld, saying:

> "There was, to be sure, a lapse of seven months between the rape and the confrontation. This would be a serious negative factor in most cases. Here, however, the testimony is undisputed that the victim made no previous identification at any of the showups, lineups, or photographic showings. Her record for reliability was thus a good one . . . we find no substantial likelihood of misidentification." 93 S.Ct. at 383.

Respondent submits that this reasoning applies in the instant case. Miss DaRonch was shown thousands of photos. Yet she never made an identification until she saw appellant . . Thus, the nine month lapse of time is not prejudicial.

Another case involving a time lapse before a photo identification was made arose in the Tenth Circuit Court of Appeals. In United States v. Roby, 499 F.2d 151 (10th Cir. 1974), a defendant was convicted of forging money orders. An eyewitness identified the defendant's picture five months after the crime. Applying the law, the Court said:

> ". . . the delay in itself should not be determinative. . . . The eyewitness here had sufficient time to observe the manner of the theft, described in detail the coat worn by the thief, . . . identified only Roby in a photographic showup of more than one photograph, and unequivocally identified Roby at trial. . . There is no evidence that the thief was masked or that the grocery store in question was poorly illuminated." 499 P.2d at 154.

Applying this language to the instant case, Miss DaRonch had sufficient time to observe the criminal. She described the assailant, identified only him from photographs, and absolutely identified him at the lineup.

The facts of the instant case demonstrate comportment with due process under Utah law and under federal standards. In State v. Ek, supra, a victim was shown a picture of the defendant, as in the instant case, but then was shown the defendant himself, by himself, and

not as a part of a lineup. That procedure was upheld by this Court. Respondent submits that the instant facts show less likelihood for inherent prejudice than in the Ek case. In State v. Gilpin, supra, a victim could not identify a defendant in a lineup. Thereafter, she was taken to Court where she observed the defendant on the witness stand as part of another case. The victim thought that could be the man. Later, she positively identified him at the preliminary hearing. The victim had to see the defendant three times before she could be sure. In the instant case, Miss DaRonch was certain the very first time she saw her assailant in person.

Mon. Nov 14, 1977

- Search of V.W. - Aug 14, 1975

Rural

+ WITNESSES:

1 Δ ① Sgt. Robert Hayward

2 Δ ② Daryl Ondisk

π ③ TWITCHELL. - 3 -

Search of Apt Aug 21, 1975

Black

5 Δ - Ben Forbes ⊛ I NEEDED for offer of Proof Mrs Smith - Scene Only.

4 Δ - Thompson

3 Δ - Bernardo

7 Δ - Warner

→ Statements to Thompson

→ WAS THERE A PRIOR MIRANDA. —

TAKE 2d

Eliminate:

⊛ TUES: Nov 15, 1977

- Auto Search - Oct 3, 1975

- Warrant —

- Certif. copy of auto title + regis. —

3 — Stevenson — HAIR IN CAR. —

4 Δ - THOMPSON

Δ - PAUL FORBES - [also in evid of Pre-line-up ID - Carol Daniels]

- TUES P.M. -

I.D. of Carl Da Ronch —

Russell
- Δ Joel Rist
- Δ Wm. O. Collard
THOMPSON
- Δ Kenyon
- Δ Hyde
- Δ Yocum — CERT of CT. DOCS. . —

Wed AM

Bleakley
- Δ Beal
- Δ Ballentyne
- Δ Thompson

Beal — Ballentyne . —
Da Ronch

Thurs AM.

Russell → Liz Harter — RUSSELL

FISHER. — Mo. TO SUPP. STMT. —

FISHER ↑ BUNDY STMT (MKD)

P.M.

Mel Smith

— Disapp. witnesses —

Fri

Mon

Judge Moore.

TIMES IMPORTANT

—

- Lois Smith — Ed

- Jolene Smith - Leave home - / NO OVERNITE. — PEP. PIZZA. -

Route to Pep. — MUSTARD SEED. -

Julie Rushton Cameron — @ Pepperonie. — Left. -

? Lois Conti — STATE ST. —

Jaclyn Boggs. Galanda — — PUTS HER IN J.B.'S -

— MRS. LOUIS SMITH — IN JB's @ 10-30 - 10:45 —

TEST DRIVE → 44 BEN FORBES. — TIME TO DRIVE. — SPEEDY. →

SENIOR MOORE —

= Recall Fisher re: Int. of Pro at Wildwood Inn.

STATE OF UTAH, }ss.
County of Salt Lake, }

In the Justice's Court

Salt Lake County *Precinct No.* 5

Before Henry Price

Justice of the Peace.

STATE OF UTAH

vs.

Theodore Robert Bundy DOB 11/24/46

565--1st Ave.

City

Defendant

COMPLAINT

On this 20th *day of* August *A. D. 19*75 *before me,* Henry Price *Justice of the Peace within and for* 5th *Precinct, Salt Lake County, State of Utah, personally appeared* Deputy Darrel Ondrak *who on being duly sworn by me, on his oath did say that* Theodore Robert Bundy at 2700 West 3500 South about 2:30 AM

on the 16th *day of* August *A. D. 19*75

at the County of Salt Lake, State of Utah, did commit the crime of

Possessing instruments, tools, devices, articles and other things adapted, designed or commonly used in advancing or facilitating the commission of an offense under circumstances manifesting an intent to use or acknowledge that some person intends to use the same in the commission of a burglary or theft, in violation of Title 76; Chapter 6, Section 205 Utah Code Annotated

STATE OF UTAH
COUNTY OF [illegible] }ss
I, THE UNDERSIGNED, CLERK OF THE MURRAY CITY COURT OF [illegible] COUNTY, UTAH, DO HEREBY CERTIFY THAT THE ANNEXED AND FOREGOING IS A TRUE AND FULL COPY OF AN ORIGINAL DOCUMENT ON FILE IN MY OFFICE AS SUCH CLERK.
WITNESS MY HAND AND SEAL OF SAID COURT
THIS 14 DAY OF November 1975
L. D. MUIR, CLERK
BY J Condit DEPUTY

contrary to the provisions of the Statute of the State aforesaid, in such cases made and provided, and against the peace and dignity of the State of Utah.

Daryl M Ondrak

Subscribed and sworn to before me, the day and year first above written.

Bench Warrant of Arrest Issued.

Justice of the Peace

IN THE DISTRICT COURT

IN AND FOR THE COUNTY OF PITKIN

STATE OF COLORADO

Criminal Action No. C-1616

THE PEOPLE OF THE STATE OF COLORADO, Plaintiff, vs. THEODORE R. BUNDY, Defendant.	MOTION TO SUPPRESS EVIDENCE

Comes now the Defendant, pro se, Theodore R. Bundy, and states as follows:

1. Rule 41 of the Colorado Rules of Criminal Procedure permits the defendant to move for the suppression of evidence on several different grounds. Defendant hereby seeks the suppression of evidence and testimony pursuant to Rule 41, and requests a court order holding such evidence inadmissible at future hearings and trial in the above-entitled action.

2. Defendant is also seeking an in camera suppression hearing. A hearing to determine whether the suppression hearing will be held in camera is scheduled for May 23, 1977. Since it would be futile to have the to-be-suppressed evidence fully described in a motion which will be made part of the public record of this case, the defendant seeks permission to reveal the exact nature of the to-be-suppressed evidence in camera on May 23, 1977. The rationale for doing so is that the cat would be out of the bag if the inadmissible evidence examined in an in camera suppression hearing was previously made a matter of public record by a motion to suppress.

3. This motion is founded on the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution, and also upon Section 7 and Section 18 of the Constitution of Colorado.

Wherefore, the Defendant requests the court to hold an evidentiary hearing on this matter, and further requests permission to enumerate the eivdence sought to be suppressed by this motion in camera on May 23, 1977.

Dated this 13th day of May, 1977.

Respectfully Submitted,

Theodore R. Bundy
Pro Se
Garfield County Jail
Glenwood Springs, Colorado

IN THE DISTRICT COURT

IN AND FOR THE COUNTY OF PITKIN

STATE OF COLORADO

Criminal Action No. C-1616

THE PEOPLE OF THE STATE OF COLORADO, Plaintiff, vs. THEODORE R. BUNDY, Defendant.	MOTION TO SUPPRESS INCORPOREAL, LINEUP, AND IN-COURT IDENTIFICATION TESTIMONY OF CAROL DARONCH

Comes now the Defendant, pro se, Theodore R. Bundy, and states as follows:

1. The prosecution has demonstrated an intention to introduce the testimony of one Carol DaRonch for the purpose of, among other things, identifying the defendant as the actor in the present action. Ms. DaRonch's testimony was received for such a purpose in a preliminary hearing in this case.

2. On several previous occasions Carol DaRonch has testified to her identification of the defendant as her kidnapper on the night of November 8, 1974. This testimony referred to identifications of defendant's photograph, an identification of defendant in a lineup and several in-court identifications.

3. Defendant maintains that each and every identification made of the defendant by Ms. DaRonch was the result of constitutionally impermissible suggestion which gave rise to a very substantial likelihood of irreparable misidentifcation, thus depriving defendant of his right to due process of law.

4. Defendant also alleges that his particiption in a line-up on October 2, 1975, pursuant to an order of court dated October 1, 1975, amounted to an unlawful seizure of his person. The Utah statute, Utah Code Annotated, 77-13-37 (1953) which purports to allow a magistrate to issue an order when there is probable cause to believe that a crime has been committed and a reason to believe that the suspect committed it is invalid and unconstitutional in that it allows a magistrate to require a person to appear in a line-up on a "reason to believe" standard rather than the "probable cause"standard established by the Fourth through the Fourteenth Amendment to the United States Constitution, thereby permitting defendant's person to be seized on a less than constitutional standard. Therefore, Carol DaRonch's testimony concerning her pre-trial line-up identification is the fruit of an illegal seizure and arrest of defendant's person, denying him due process of law.

Wherefore, Defendant moves the court to hold an evidentiary hearing on this matter and further requests an order suppressing the use of Carol DaRonch's identifcation testimony because it is the result (1) of procedures so suggestive as to violate defendant's right to due process and (2) of an unreasonable seizure and arrest of his person.

Dated this 24th day of May, 1977.

Respectfully Submitted,

Theodore R. Bundy
Pro Se
Garfield County Jail
Glenwood Springs, Colorado

IN THE DISTRICT COURT

IN AND FOR THE COUNTY OF PITKIN

STATE OF COLORADO

Criminal Action No. C-1616

THE PEOPLE OF THE STATE OF COLORADO,	)	MOTION TO SUPPRESS PHOTOGRAPHIC IDENTIFICATION TESTIMONY OF LIZABETH HARTER
Plaintiff,	)	
vs.	)	
THEODORE R. BUNDY,	)	
Defendant.	)	

Come now the Defendant, pro se, Theodore R. Bundy, and stees as follows:

1. The prosecution intends to present at trial the testimony of one Lizabeth Harter. During the preliminary hearing in the above-entitled action she testified to the effect that she viewed a photographic line-up on or about January 16, 1976, and at that time picked a picture from among those shown because the person in the picture resembled, to some degree, a man she recalled seeing on January 12, 1975. The person depicted in the photogrph picked by Mrs. Harter is the defendant, Theodore R. Bundy.

2. Circumstance both preceding and surrounding Mrs. Harter's viewing of the incorporeal line-up gave rise to a very serious and substantial likelihood of irreparable misidentification, thus depriving the defendant of his right to due process of law.

Wherefore, the Defendant moves the court for an evidentiary hearing on this issue, and further requests that upon conclusion of said hearing the testimony by Mrs. Lizabeth Harter concerning the identification in question be suppressed.

Dated this 9th day of May, 1977.

Respectfully Submitted,

Theodore R. Bundy

Theodore R. Bundy
Pro Se
Garfield County Jail
Glenwood Springs, Colorado

IN THE DISTRICT COURT

IN AND FOR THE COUNTY OF PITKIN

STATE OF COLORADO

Criminal Action No. C-1616

THE PEOPLE OF THE STATE OF COLORADO, Plaintiff, vs. THEODORE ROBERT BUNDY Defendant.	SUPPLEMENT TO MOTION TO SUPPRESS EVIDENCE

Comes now the Defendant, pro se, Theodore Robert Bundy, and states as follows:

1. On May 13, 1977, defendant filed a Motion To Suppress Evidence. A hearing on this motion is presently scheduled for June 22, 1977.

2. Defendant was necessarily vague in his Motion To Suppress so as to avoid the public dissemination of information concerning evidence sought to be suppressed which might prove prejudicial to the defendant. The purpose of this Supplement is to give the prosecution adequate notice in order that it may prepare for the hearings on this matter.

3. On May 26, 1977, Judge George Lohr, District Attorney Milton K. Blakey and the defendant reached an understandi~~ng~~ standing on the record that the defendant would describe in more detail the testimony and physical evidence to-be-suppressed in a Supplement. Further, it was agreed that the Supplement would not be made public by the court and that the District Attorney would maintain the strictest confidentiality with respect to this supplemental motion.

4. Defendant's Motion To Suppress requests a hearing to determine the admissibility of and moves for court ordered suppression of the following:

(a) Testimony concerning and evidence seized during a search of defendant's 1968 Volkswagen on August 16, 1975.

(b) Testimony concerning and evidence seized during a search of defendant's apartment on August 21, 1975.

(c) All items of physical evidence, including hair specimens, obtained from a 1968 Volkswagen formerly owned by the defendant, which vehicle was seized on October 3, 1975, pursuant to a search warrant issued on October 2, 1975.

(d) Credit card slips dated January 12, 1975, and January 13, 1975, which were allegedly signed by the defendant.

Wherefore, defendant requests that this Supplement be incorporated as part of his Motion To Suppress Evidence, that the legal grounds and relief sought in that Motion apply to the testimony and evidence listed in Paragraph 4. of this Supplement, and that the court order such additional and further relief as it deems proper.

Dated this _____ day of May, 1977.

Respectfully Submitted,

_____

Theodore Robert Bundy
Pro Se
Garfield County Jail
Glenwood Springs, Colorado 81601

IN THE DISTRICT COURT

IN AND FOR THE COUNTY OF PITKIN

AND STATE OF COLORADO

Criminal Action No. C-1616

THE PEOPLE OF THE STATE OF COLORADO, Plaintiff, vs. THEODORE ROBERT BUNDY, Defendant.	MOTION IN LIMINE

COMES NOW the Defendant, Theodore Robert Bundy, pro se, and moves, in limine, for an Order prohibiting the prosecution from presenting certain evidence enumerated herein. As grounds therefore, the defendant states and alleges as follows:

1. The prosecution has indicated that it will seek to use as "similar" transactions or occurances (1) a transaction involving Carol DaRonch, and (2) a transaction involving Melissa Smith. Defendant alleges that the above transactions and the crime charged are entirely different, are not connected, and are not an aid in proving design, intent, motive, identity, or guilty knowledge.

2. Defendant should only be tried for the crime charged and the interduction of transactions not related to the present case will create a "daming innuendo likely to beget prejudice in the minds of the jurors, and that such evidence tends to confuse and lead the jury astray."

3. The prosecution also intends to introduce an expert's opinion in connection with micrscopic comparison of hair taken from the deceased, Caryn Campbell, and hair found in a vehicle formerly owned by defendant. The expert, Robert Neill

of the FBI, has testified at a preliminary hearing in this matter that two strands of hair found in this vehicle are "microscopically like" many of the head hairs taken from the deceased.

4. Such evidence is inadmissible because it fails to express with reasonable scientific certainty that the hairs came from the same source. The introduction of opinion testimony of such doubtful scientific validity tends only to prejudice the case against the defendant.

5. When the aforementioned evidence is tendered in open court by the prosecution, the defendant will vigorously assert its inadmissibility.

6. Under present law, the aforementioned evidence is inadmissible in the case at bar.

7. Extreme prejudice to the defendant will result if the Court allows the prosecution to present said evidence in the presence of the jury before the Court rules on admissibility.

WHEREFORE, the defendant prays for a hearing prior to the commencement of trial on the allegations set forth in this Motion, and moves the Court for an Order prohibiting the prosectionfrom presenting the aforementioned evidence and such further relief as the Court deems just and proper.

DATED this 14 day of September, 1977.

Respectfully Submitted,

Theodore Robert Bundy
Pro Se
Garfield County Jail
Glenwood Springs, Colorado 81601
Phone: (303) 945-9151

Recd. 9-13-77 MKB

IN THE DISTRICT COURT
IN AND FOR THE COUNTY OF PITKIN
AND STATE OF COLORADO

Criminal Action No. C-1616

THE PEOPLE OF THE STATE OF COLORADO, Plaintiff, vs. THEODORE ROBERT BUNDY, Defendant.	SUPPLEMENT TO MOTION IN LIMINE

COMES NOW Theodore Robert Bundy, defendant pro se, and states as follows:

1. The District Attorney, on September 7, 1977, filed with the Court a Notice of Intent to Introduce Additional Similar Transactions. One of these transactions involves the disappearance of Debra Kent from Bountiful, Utah in November, 1974, and the second involves the disappearance and death of Laura Aime in Utah County, Utah, in November, 1974.

2. Defendant filed a Motion In Limine on September 1, 1977, requesting that the Court order the transactions involving Carol DaRonch and Melissa Smith inadmissible since an accused should only be tried for the crime charged and not for incidents which are wholly independant of the charged offense.

WHEREFORE, defendant moves the Court conduct a hearing prior to the commencement of trial to determine the admissibility of the "similaar transactions" and include in that hearing transactions involving Ms. Kent and Ms. Aime.

Respectfully Submitted,

Theodore Robert Bundy

Theodore Robert Bundy
Pros Se
Box 249
Glenwood Springs, Colorado 81601

Dated this 12th day of September, 1977.